In the Supreme Court of the United States

OCTOBER TERM, 1967

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

NEW ENGLAND ELECTRIC SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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Respondents urge (p. 6) that only evidentiary and factual questions remain in this case and suggest (p. 7) that we are asking this Court to determine whether the court below correctly applied the standard that agency decisions must be supported by substantial evidence. On the contrary, the court below did not find that the Commission's decision was not supported by substantial evidence, and we are not asking this Court to review the evidence. We seek

review because the court below restricted the Commission's authority to limit public utility holding companies to a single integrated system in a manner which is contrary both to this Court's prior decision and to the purpose and policy of the Act. This was done in three principal ways.

1. The court transmuted this Court's requirement that holding companies seeking to retain additional systems must meet a "much more stringest test" than that originally applied by the court below into a rule that a Commission decision declining to permit a holding company to retain an additional system will be invalidated if it fails to withstand a "*most stringent* practical standard" of analysis and expertise (Pet. 22). Respondents explain (Br. in Opp. 9):

> The importance of the care and thoroughness required of the Commission by the court below is emphasized by this Court's standard of "serious impairment." The line is now drawn so close to the point of probable business failure that not only does it make the holding company's burden of proof a difficult one to carry, but it also makes the risk more substantial that a divestment order based on erroneous findings and broad assumptions rather than individual consideration will result in economic disaster (Pet. 27).

Thus, the Commission's reading of Clause A, which this Court upheld and found to have been consistently adhered to by the Commission (384 U.S. 176, 179, 182), is to result in all doubtful questions being resolved against the Commission. By this alchemy the holding company's "difficult" burden of proof becomes

an obstacle rather than an aid to carrying out Section 11.

2. The court below required the Commission to treat as proven holding company estimates of the amount of loss which would be entailed by separation of an additional system, however unconvincing such estimates may be, except to the extent that the Commission proves them to be fallacious. The Commission must then confine its inquiry to the possible impact of a loss of that amount upon various financial aspects of the particular system, since the court below rejected as irrelevant the size and operating characteristics of the system and comparisons with the actual operation of other systems.

The requirement that the Commission must accept estimates of loss contained in the Ebasco report, except insofar as the Commission could demonstrate particular errors of fact or analysis, not only ignores unexplained disparities in the estimates of increased expense,[1] but, more fundamentally, ignores the fact that the alleged losses represent only an aggregate of estimated items of cost of obtaining, on a separate basis for the severed gas system, those limited services for these unrelated businesses that are now per-

[1] As indicated in its Findings and Opinion (Pet. 52-57), the Commission concluded that the Ebasco study was based on questionable assumptions and cost allocations which affected the reliability of a substantial part of the Ebasco estimate. There is no basis upon which it can be determined that, as a consequence of these defects, the projected increase in cost would be reduced only by $60,000, as calculated by the court below and emphasized by respondent (Br. in Opp. 14).

formed by service company employees or by common employees of the gas and electric company. It is inherently doubtful that estimates so constructed and submitted on behalf of the holding company seeking to retain both its electric and gas properties would represent the actual difference between (a) the results of operations as part of a holding company system operating both electric and gas properties and (b) the results of actual operation of a severed system under a management operating only gas properties and with normal motives for achieving maximum profits.[2]

3. The court below refused to permit the Commission to give weight in a particular case to the advan-

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[2] *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, upon which respondents rely (p. 15), does not aid them. There in rejecting the contention that an order of a State public utility commission reducing rates was invalid because not based on expert testimony as to the effect of the reduction on the volume of traffic, the Court stated (p. 560): "Experts' judgments, however, would not bind the Commission. Their testimony would be in the nature of argument or opinion, and the weight to be given it would depend upon the Commission's estimate of the reasonableness of their conclusions and the force of their reasoning." Respondents suggest that the Securities and Exchange Commission "cannot fairly be expected to have detailed expertise" as to such matters as "the practicability of combined customer billing," and that the agency therefore was required to accept the estimates on these issues contained in the Ebasco report. But the Commission's broad experience and expertise in the administration of the Public Utility Holding Company Act of 1935 qualified it to evaluate the overall reliability of the Ebasco study—a study which, by its very nature, basically involves "argument or opinion."

tages of free competition and independent operation except to the possible extent that some "definable particularized benefit will accrue" (Pet. 33), notwithstanding this Court's conclusions in its prior opinion that the benefits of competition, although "difficult to forecast," are a matter for Commission expertise on the total competitive situation. 384 U.S. at 184.

Respondents argue (pp. 10-11) that the court below has not required the Commission to make a finding of "specific dollar value" but merely a "best estimate" or a finding or articulation of "specific or approximate financial benefit" before it can give weight in the particular case to benefits likely to flow from competition. This scarcely meets the issue whether the decision below conforms to this Court's opinion, which we view as upholding the propriety of the Commission giving weight to "[c]ompetitive advantages to be gained by a separation" however "difficult to forecast." That conclusion, contrary to the suggestion of the court below, does not make the Commission's divestment orders as a practical matter "unreviewable." It merely means, as this Court suggested, that the extent of the gains to competition and the related public interest are matters with respect to which the Commission is entitled to use its expertise and that the Commission is not limited to a "prediction whether, for example, a gas company in a holding company system may make more for investors than a gas com-

pany converted into an independent regime." 384 U.S. at 185.

Respectfully submitted.

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